Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

KEITH MILTON RHINEHART,
a single person;
AQUARIAN FOUNDATION,
a Washington not-for-profit Corporation,

Petitioners,

vs.

THE SEATTLE TIMES,
a Delaware corporation,
d/b/a THE SEATTLE TIMES,
ERIK LACTITIS and JANE DOE LACITIS,

Respondents.

Petition For Writ Of Certiorari
To The Court Of Appeals, Division I,
Of The State Of Washington

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Are First Amendment Rights to privacy and association denied when a court imposes a protective order and orders discovery, in lieu of performing a balancing test to determine whether membership lists of Spiritualist religion should be produced? *YES.*

2. Is it a denial of Due Process and Equal Protection when a fee statute is interpreted to award fees without requiring the party to segregate fees unrelated to action dismissed for lack of merit? *YES.*

3. Is it a denial of Due Process and Equal Protection when the subjective criterion, "possibility of success" is used in finding a case frivolous and awarding terms? *YES.*

PARTIES TO THE PROCEEDING

All parties for the captioned case on the cover are fully set forth. This case is consolidated with:

AQUARIAN FOUNDATION,
a not-for-profit corporation;
REVEREND KEITH MILTON RHINEHART,
a single person;
LINDA DUNN, a married person,

Appellants,

v.

THE SEATTLE TIMES, INC.
a Delaware corporation;
ROSS ANDERSON, JANE DOE ANDERSON,
and his marital community,

Respondents.

TABLE OF CONTENTS

Page

ISSUES PRESENTED FOR REVIEW..... i

PARTIES TO THE PROCEEDING..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

REPORTS OF OPINIONS IN THE CASE..... 1

GROUNDS UPON WHICH U.S. SUPREME COURT JURISDICTION INVOKED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 2

STATEMENT OF THE CASE 3

FEDERAL QUESTIONS TIMELY RAISED 8

ARGUMENT..... 9

1. Are First Amendment Rights to privacy and association denied when a court imposes a protective order and orders discovery, in lieu of performing a balancing test to determine whether membership lists of Spiritualist religion should be produced? *YES* 11

2. Is it a denial of Due Process and Equal Protection when a fee statute is interpreted to award fees without requiring the party to segregate fees unrelated to action dismissed for lack of merit? *YES*..... 19

3. Is it a denial of Due Process and Equal Protection when the subjective criterion, "possibility of success" is used in finding a case frivolous and awarding terms? *YES*..... 22

TABLE OF CONTENTS – Continued

Page

CONCLUSION..... 25

APPENDICES ..... App. 1

A. OPINION SOUGHT TO BE REVIEWED AND SUBSEQUENT ORDERS..... App. 1

1. *OPINION OF THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION I, Rhinehart v. the Seattle Times* 59 Wash. App. 332, 798 P.2d 1155 (1990).....App. 1

2. Order affirming decision after remand, May 3, 1993.....App. 15

3. Order denying Appellants' Motion for Reconsideration, December 6, 1993...App. 17

4. Order denying Petition for Review to Washington State Supreme Court, July 6, 1994..... App. 19

B. CONSTITUTIONAL AND STATUTORY PROVISIONS CITED..... App. 21

1. *U.S. CONSTITUTION, AMENDMENT I*..... App. 21

2. *U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1*....App. 22

3. *RCW 4.84.185*.....App. 23

TABLE OF AUTHORITIES

Page

CASES:

Black Panther Party v. Smith, 661 F.2d 1243 (C.A D.C. 1981) 17

Britt v. Superior Court, 20 Cal. 3d. 844, 143 Cal. Rptr. 695, 574 P.2d 766 (1978) 15, 17

Britton v. Rogers, 631 F.2d 572 (C.A. Ark, 1980), *cert. den.* 101 S.Ct. 2021, 451 U.S. 939, 68 L.Ed.2d 327 21

Brown v. Socialist Workers, 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982)..... 15, 17

Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972)..... 17

Caldwell v. State of Texas, 11 S.Ct. 224, 137 U.S. 692, 34 L.Ed. 816 (1891) 21

Church of Hakeem, Inc. v. Supreme Court, 110 Cal. App. 3d. 384, 168 Cal. Rptr. 13 (1980) 17

Ciechon v. City of Chicago, 686 F.2d 511 (C.A. Ill. 1982) 21

Ealy v. Little John, 569 F.2d 219 (5th Cir. 1978) 17

Eilers v. Palmer, 575 F. Supp. 1259 (Mn. 1984) ..16, 18

Families Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976) 17, 18

Gaglidari v. Denny's Restaurants, 117 Wash.2d 426, 815 P.2d 1362 (1991) 20

Hanbron v. Epstein, 412 F. Supp. 256 (D.C. Md 1976) *aff'd* 97 S.Ct. 41, 429 U.S. 802, 50 L.Ed.2d 67 22

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Chicago, 36 S.Ct 715, 241 U.S. 533, 60 L.Ed. 1148 (1916) 23

NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 1171 L.Ed.2d 1483 (1958) 17

Nordstrom, Inc. v. Tampourlos, 107 Wash. 2d 735, 733 P.2d 208 (Wash. 1987) 20

Pearson v. Northeast Airlines, 309 F.2d 553 (C.A.N.Y 1962) *cert. den.*, 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720 21

Rhinehart v. KIRO, 44 Wash. App. 707, 723 P.2d 22 (1986) 14

Rhinehart v. Seattle Times, 98 Wash.2d 226, 654 P.2d 673 (1982) 13, 14

Rhinehart v. Seattle Times, 59 Wash. App. 332, 798 P.2d 1155 (1990) 1, 13

Seattle Times v. Rhinehart, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) 3

Shock v. Tester 405 F.2d 852 (C.A. Ark 1969), *cert. den.* 89 S.Ct. 1641, 394 U.S. 1020, 28 L.Ed.2d 45; *reh. den.* 89 S.Ct. 2004, 395 U.S. 941, 23 L.Ed.2d 460 22

Snedigar v. Hodderson, 114 Wash. 2d 153, 786 P.2d 781 (1990) 11, 12, 13, 14, 16

Stone v. Chelan County Sheriff's Dept., 756 P.2d 736, 110 Wash.2d 806 (1986) 24

Streater v. White, 26 Wash. App. 430, 613 P.2d 187 (1980) 25

Surinach v. Presquera de Busquets, 604 F.2d 73 (1st Cir. 1979) 17

TABLE OF AUTHORITIES – Continued

Page

Travis v. Washington Horse Breeders, 111 Wash. 2d 396, 759 P.2d 418 (Wash. 1988) 20

Zannino v. Arnold, 531 F.2d 687 (C.A. Pa. 1976) 24

OTHER AUTHORITIES:

United States Constitution, Amendment I ..... *passim*

United States Constitution, Amendment XIV, Section 1 2

Revised Code of Washington, 4.84.185 ..... 2, 9, 19, 20

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

THESE ARE FULLY SET FORTH IN APPENDIX A, AND INCLUDE:

***OPINION OF THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION I, Rhinehart v. the Seattle Times,* 59 Wash. App. 332, 798 P.2d 1155 (1990); Order affirming decision after remand, May**

3, 1993; Order denying Appellants' Motion for Reconsideration, December 6, 1993; Order denying Petition for Review to Washington State Supreme Court, July 6, 1994.

GROUNDS UPON WHICH JURISDICTION OF U.S. SUPREME COURT INVOKED

This case seeks review of two consolidated King County Superior Court cases, # 82-2-17487-4 and #86-2-09172-6. The cases were dismissed and costs and attorneys fees in 86-2-09172-6 were awarded on April 22, 1988; an order setting the amount of fees awarded was entered May 11, 1988. This matter was timely appealed to the State of Washington Court of Appeals, division I, found partly meritorious in a published opinion, and affirmed after remand. Petition for review was timely made and was denied July 6, 1994. (See App. 1 *et seq.*)

Jurisdiction is conferred upon this court by 28 USC 2101 (c) and 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendments I and XIV. (at App. 21 and App. 22 herein)

Revised Code of Washington 4.84.185 (At App. 23 herein)

STATEMENT OF THE CASE

This Petition for Certiorari arises from the dismissal of two separate defamation suits, consolidated at the trial court level, filed against the Seattle Times by Aquarian Foundation and its Spiritual Leader, Reverend Keith Milton Rhinehart.

The first, **AQUARIAN FOUNDATION v. SEATTLE TIMES**, 1982, concerned a defamatory article written by Erik Lacitis, a Seattle Times Staff Columnist. (CP 17.) This article was engineered by The Seattle Times' attorneys, who solicited and provided an attorney for the filing of a lawsuit against Aquarian Foundation, a Spiritualist religion. The case was never prosecuted, but pleadings were extensively published in the newspaper, in order to circumvent a court protective order regarding prior litigation between the parties. (The protective order was upheld by This Court in ***Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).** The trial judge declined to dismiss the case on the merits pursuant to a summary judgment motion, but dismissed it after Aquarian Foundation failed to comply with the order of discovery of AQUARIAN FOUNDATION'S membership list. The second case, ***AQUARIAN FOUNDATION v. SEATTLE TIMES,*** 1986, concerned articles (CP 5043) written by Ross Anderson, a writer for the Times Washington Bureau (CP 5084.) On May 11, 1988 the trial court entered an order finding the claim a frivolous one. On post trial motion the trial court

awarded $40,000 in attorneys fees and $1,983.21 in expenses, although counsel never segregated the time entries as to those that were necessary because of the dominant case. Appellants filed a timely consolidated appeal on May 20, 1990.

In a published opinion on August 13, 1990, the appeal was partly affirmed and partly remanded because the Trial Court had abused it's discretion in faili g to create a sufficient record as to the amount of fees awarded. After remand, the trial court findings were affirmed. (THE FULL TEXT OF THE PUBLISHED DECISION APPEARS AT APP. 1 HEREIN.)

(2) FACTS RELEVANT TO THE RELIEF SOUGHT

1982 CASE: ENGINEERED DEFAMATION

This defamation case concerns an article, "Lawsuits, Controversy Still Surround Aquarian Leader", by Erik Lacitis, and published in the Seattle Times Newspaper on January 3, 1981. (CP 25.) Plaintiffs alleged an extensive list of false, defamatory statements in this article, (CP 1492.) The Seattle Times has a history of publishing defamatory articles concerning AQUARIAN FOUNDATION, a Spiritualist religion. (CP 1497.)

The Lacitis article quoted from a lawsuit filed (in name) by former Church members. (CP 25.) Remarkably, the lawsuit was inspired and engineered by the Seattle Times' own attorneys to create a public record so that the Newspaper could publish quotations without being subject to a defamation

lawsuit, or a prior court order barring them from naming Religion members. Direct payments by Seattle Times attorneys to bring the former church member to Seattle from Hawaii (CP 2063), and to pay her for lost time from her job, (CP 2063) and to convince her to file the lawsuit, (CP 2064) and to locate an attorney for her without charge (CP 2062), created an ugly pattern of persecution of this minoritarian religion.[1]

The lawsuit was drafted to self-serve the Seattle Times, including allegations (irrelevant to the purported plaintiff/former Church members) that the Church used lawsuits to harass the media. (CP 1840.)

The trial court declined to grant summary judgment to defendants, but instead dismissed the lawsuit for failure to produce membership lists and a videotaped presentation of the church to the Walla Walla prison. (CP 4628.)[2]

Plaintiffs had supplied massive discovery materials, thousands of pages, including, among other documents, 9 depositions, and had offered

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[1] The law suit, widely quoted in the newspaper, was never prosecuted. (King County Case no. 80-2-16434-1.) The former Church member, Denise Herr, was adjudged to have taken several thousands of dollars of Aquarian Foundation property in a separate action. When she tried to discharge the debt in Bankruptcy court in Hawaii, She was adjudged a "defalcator" and discharge was denied.

[2] The Petitioners agreed to produce the video presentation if certain portions were edited or altered to protect the identity of individuals, but the trial court declined to fashion these protections.

boxes of church records regarding donations and receipts to be examined. The Seattle Times never attempted to contact any of the persons identified in the depositions, nor did it request an appointment to view any records that were offered to it. There was no attempt at any alternative ways to discover information relative to the defense, although Plaintiffs filed a memorandum suggesting several alternative methods to obtain or seek the same data. (CP 1223.) The Seattle Times never offered any evidence that the membership lists and/or the videotape was critical to its defense that the articles it published were not defamatory.

1986 CASE CONSOLIDATED WITH 1982 CASE, DISMISSED AS FRIVOLOUS.

The 1986 lawsuit was based upon a series of articles referring to Aquarian Foundation as a "cult." (CP 5040) and referring to Reverend Keith Milton Rhinehart as a "Cult Leader." (CP 5040.) This article was a contemporary of the media blitz of such murderous cults as that of Jim Jones.[3] The term "bizarre" was used to describe plaintiffs, (CP 5086) and the paper reported that Reverend Rhinehart was wealthy from funds "accumulated to the expense of the Foundation, its members, and its donors." (CP 5085.)

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[3] Major media had directly tried to incite a "Jim Jones" image for Petitioners; KIRO TV panned rows of dead bodies in Guyana, followed by a shot of Petitioner's Church and church name. King County Docket No. 86-2-03775-6.

The 1986 lawsuit was filed separately by prior counsel, and was consolidated with the 1982 case by motion of Aquarian Foundation to conserve judicial resources. The trial court granted a summary judgment and found the 1986 lawsuit to be frivolous.

COURT ORDERS $40,000 IN FEES FOR 1986 LAWSUIT

The order regarding attorneys fees for the 1986 case was entered pursuant to an affidavit of P. Cameron DeVore, (CP 4485.) The affidavit did not segregate the fees for the predominant 1982 action from the fees for the 1986 action. Instead, it includes work conducted on the 1982 case, and work regarding thousands of pages of discovery that relate solely to that case.

Except for approximately $6000.00 in entries, all of Mr. DeVore's affidavit demonstrates that the time spent was necessary for furthering the work on the **1982** case, the case that was not found frivolous, and in which the court declined to grant summary judgment on the merits. Nevertheless, Mr. DeVore's affidavit arbitrarily claimed 50% of his firm's work to be allocated to the **1986** case.

Specifically, entries for 8/8/86, 8/11/86, and 8/12/86 relate to reviewing the brief for a motion to dismiss/summary judgment, revising the brief, and editing the brief for the 1986 case, which was dismissed pursuant to that summary judgment motion. The total fees claimed at the end of page 6 (CP 4491) is $5669.00.

Fees claimed from page 7 through 28 of the DeVore affidavit are, except for a few limited entries, tasks clearly necessary for defending the 1982 case.

The fee award troubled the state court, and the case was remanded for further findings of fact. App. 12. However, the court did not require that the fee request be segregated between actual work that was required by the case deemed by the court to be frivolous, and the dominant, 1982 case.

APPEALS COURT USES SUBJECTIVE CRITERIA

In upholding the finding of frivolity of the 1986 case, the State court used two criteria: one, applied to Petitioners, was whether there is a reasonable possibility of success. (App. 11.) The other, more commonly applied to other litigants, was whether there is a basis for the action in fact or in law.

FEDERAL QUESTIONS TIMELY RAISED

All of the issues herein were considered in the court's published opinion, set forth in full in beginning at App. 1. The issues were preserved by petitioners in their Petition for review with the State Supreme Court, through numbers 1,2,3, and 5 listed on page 2.

ARGUMENT

THE ISSUES SET FORTH IN THIS PETITION ARE IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN BUT SHOULD BE, SETTLED BY THIS COURT.

Summary of Arguments

In this case, a Spiritualist religion sought to prevent a predatory press from defaming it, and then was forced to choose between its First Amendment Rights to keep secret its membership lists, and its need to vindicate its reputation. Further, the religion was punished by the courts, and forced to pay more than $40,000 in terms, although only a minor portion of the cases before the courts were found frivolous.

By ordering membership lists, without conducting a balancing test as to the need for the data and the availability of alternative sources of discovery, the state court invaded the First Amendment rights of Aquarian Foundation and its members. Imposing a protective order was only a band-aid, when First Amendment Rights of innocent Church members were ordered to be invaded without a finding that the defendant's need for the data outweighed the rights to privacy and association of the members.

As if rubbing acid into a wound, the court then imposed more than $40,000.00 in fees against the petitioners, although it dismissed a very simple portion of the case. The fee award was purportedly authorized by a State law, RCW 4.84.185, allowing "reasonable fees" for portions of cases found frivolous. The court improperly allowed Seattle Times

counsel to arbitrarily allocate 50% of fees to that minor part of the action.

This award is phenomenal. For example, in the Ninth Circuit large monetary sanctions (greater than $25,000.00) are granted in less than 4% of cases. See, *Otorowski* at 24. Terms of this magnitude are excessive and shocking, and could literally bankrupt a minority association. The state court exacted this property from petitioners by exceeding its constitutional authority under the statute; the statute authorizing fees allowed an award for only the "action, counterclaim, cross claim, third party claim or defense" deemed frivolous. App. 23.

In further rulings showing an attitude towards this Spiritualist religion as a second class litigant, the state court applied a subjective criterion, "possibility of success," in upholding a finding of frivolity. This criterion is fashioned to defeat and jeopardize the minoritarian litigant, who, when championing an extension or modification of the laws, will always have a lesser "possibility of success." Therefore, the state court rulings establish a precedent to punish, and chill, the ability of minoritarian groups to seek justice in the Washington state courts.

ARGUMENT

1. Are First Amendment Rights to privacy and association denied when a court imposes a protective order and orders discovery, in lieu of performing a balancing test to determine whether membership lists of Spiritualist religion should be produced? *YES.*

A. *ALTHOUGH IN 1990, THE WASHINGTON SUPREME COURT ENDORSED THE BALANCING TEST CONSISTENTLY WITH FEDERAL LAW, THE CASE AT BAR REPRESENTS A RETREAT FROM THOSE CRITERIA.*

***Snedigar v. Hodderson,* 114 Wash. 2d 153, 786 P.2d 781 (1990)** reversed a default judgment against a political party, when the trial court had ordered membership lists and minutes of meetings. The case was remanded to require the trial court to engage in a balancing test between the First Amendment Constitutional right to privacy of the political party members, and the extent to which the discovery sought was relevant, essential to the opposing party's case, and not reasonably available through other means.

Thus, the Washington courts adopted the prevailing analysis required to protect the First Amendment rights to freedom of Religion and Freedom of Association, agreeing with other federal and state courts that disclosure of membership lists will chill the First Amendment rights of an association. **114 Wash. 2d. at 162.** In the ***Snedigar*** case, the court opined:

> **Given the great importance of these rights, it is preferable to weigh whatever claims of chilling effect are made against the need for disclosure.** ***Id. at 163.***

The court then described the rest of the balancing test involved in assessing a discovery request for associational information.

> **[O]nce a threshold showing of privilege is made, the burden shifts to the party seeking discovery to establish the relevancy and materiality of the information sought, and to make a showing that reasonable efforts to obtain the information by other means have been unsuccessful.** ***Id.*** **at 164 . . .**
>
> **With regard to relevancy, the interest will be regarded as relatively weak unless the information goes to the "heart of the matter" . . . Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity . . .**
>
> **The litigant seeking disclosure must also show that efforts have been made to obtain the information by other means . . . [S]hould be compelled only after the litigant has shown that he has exhausted every reasonable alternative source of information.** ***Id. at 165.***

The ***Snedigar*** court remanded the case to the trial court to require the requesting party to show the need for the information and to demonstrate how it had attempted to obtain the information in other ways.

In the instant case, the state court of appeals ignored the clear criteria of the ***Snedigar*** court. The August, 1990 opinion states:

> **Indeed, under *Snedigar*, the second and third steps of relevancy evaluation and balancing would not be reached here because the findings and conclusions of the prior cases have already determined that Rhinehart has not shown some probability that the requested disclosure would impinge on the Foundation's constitutional rights, especially in light of the protective orders. *Rhinehart v. Seattle Times*, 59 Wash. App. at 338. (at App.7 herein)**

In fact, prior ***Rhinehart*** cases found just the opposite. The first case, ***Rhinehart v. Seattle Times Co.*, 98 Wash. 2d. 226, 654 P.2d 673 (1982)**, includes a specific record of media harrassment and reprisals, and in it the trial judge in that case specifically found:

> **[I]f protective orders were not available, "it could have a chilling effect on a party's willingness to bring his case to court." . . . If the absence of a Protective Order has the effect of denying a party access to the courts, this would be a result just as damaging to justice and to individual rights as**

> **can result from an impingement upon First Amendment Rights.** ***654 P.2d at 675.***

This language confirms that the trial court found a probable invasion of First Amendment rights, and thus the Appeals court's reading of these prior cases in the instant case is completely erroneous.[4]

Additionally, in the 1982 case before This Court, the allegations are part and parcel that of direct harrassment by the media, to the extent of soliciting former members of Petitioner to file litigation against Aquarian Foundation.

THE BALANCING TEST IS REQUIRED BECAUSE OF IMPINGEMENT ON FIRST AMENDMENT RIGHTS, AND BECAUSE OF THE CHILLING EFFECT UPON THE FREEDOM OF ASSOCIATION AMONG INNOCENT THIRD PARTIES.

> **. . . [F]or more than two decades decisions of both the United States Supreme Court and this court, recognizing that compelled disclosure of private associational affiliations or activities will inevitably deter many individuals from exercising their constitutional right of association, have established that such intrusion into associational privacy may be sanctioned only**

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[4] Later ***Rhinehart*** cases have similarly not addressed the specific balancing criteria required by ***Snedigar,*** which was decided later than these cases, i.e., ***Rhinehart v. KIRO,*** **44 Wash. App. 707, 723 P.2d 22 (1986).**

> **upon the demonstration of a very important, indeed "compelling", . . . interest which necessitates the disclosure.**

***Britt v. Superior Court,* 143 Cal. Rptr. at 697.**

This Court has repeatedly defined a test that requires a very low threshold of scrutiny in order to require a balancing test to exempt minor parties from compelled disclosures:

> **. . . need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from . . . private parties.**

***Brown v. Socialist Workers,* 459 U.S. 87, 74 L.Ed.2d 250, 103 S.Ct. 416 (1982).**

This threshold was met by Aquarian Foundation both through the affidavits of actual harrassment submitted throughout the various actions against the defaming media, and through the very nature of the facts in this action, where the media's own attorneys actively cajoled and paid former members to defame the organization. The media exhibited a pattern of hostility towards this minoritarian group. This is exactly the threshold described by This Court in *Brown:*

> **The proof may include, for example, specific evidence of past or present harrassment of members due to their associational ties, or of harrassment directed against the organization itself. A pattern of . . . hostility may be sufficient. *Id. at 74 L.Ed.2d 257.***

That petitioners are a religion that many would consider to be unorthodox has gained special consideration in the case of ***Eilers v. Palmer*, 575 F. Supp. 1259 (1984).** That court opined:

> **. . . [T]he supporters themselves, for various reasons, may have a desire for anonymity that might cause them to withhold support knowing that their names would be disclosed. *This is a particular concern in cases such as this where the supporters are likely to be members of unorthodox religious groups.*** (Emphasis added) ***Id.* at 1261.**

Despite the long decisional history of careful treatment of associational and first amendment rights, and despite its own recent *Snedigar* decision that affirmed these criteria, the state court ignored the record and ignored the right to a balancing test in this case.

B. *THE ISSUE OF DISCLOSURE OF MEMBERS OF A CHURCH IN DISCOVERY IS ONE OF CONSTITUTIONAL MAGNITUDE THAT SHOULD BE DECIDED BY THE UNITED STATES SUPREME COURT.*

The Washington court acknowledges that the issue of membership disclosure is constitutional in magnitude. The court's opinion in this case states:

> **In addition, Rhinehart contends that the decisions in these prior [Rhinehart] cases are ill-reasoned and in conflict with the law of other jurisdictions and should now**

be reversed. At this juncture, a reversal could only come from the Supreme Court. 59 Wash. App. at footnote #3. See App. herein.

Established legal authority recognizes an inevitable chilling effect on the right of association. In two U.S. Supreme Court cases, compelling disclosure of member or donors' names has been acknowledged to have a chilling effect upon freedom of association. ***Brown v. Socialist Workers,* 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed. 252 (1982); *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 1171 L.Ed.2d 1483 (1958).**

Other jurisdictions have ruled that there is constitutional protection against compelling production of membership and donor lists of a church. See ***Surinach v. Presquera de Busquets,* 604 F.2d 73 (1st Cir. 1979); *Church of Hakeem, Inc. v. Supreme Court,* 110 Cal.App.3d 384, 168 Cal.Rptr 13 (1980).**

The ***Britt*** court, *op cit,* held that the compelled disclosure of Church membership records violated the constitutional associational rights of church members, *even though* the disclosure issue arose in the context of pretrial discovery in civil litigation.

First amendment associational rights and the chilling effect of disclosure of membership lists have been recognized for secular organizations as well. ***Black Panther Party v. Smith,* 661 F.2d 1243 (5th Cir. 1960); *Ealy v. Little John,* 569 F.2d 219 (5th Cir. 1978); *Families Unidas v. Briscoe,* 544 F.2d 182 (5th Cir. 1976); *Bursey v. United States,* 466 F.2d 1059 (9th Cir. 1972).**

C. *IT IS CRITICAL THAT THIS COURT STOP EROSION OF ESTABLISHED AUTHORITY, AND AFFIRM THAT THE ASSOCIATIONAL RIGHT, AND NOT THE DISCOVERY RIGHT, IS THE PRIMARY RIGHT TO BE PROTECTED. SNEDIGAR* AT 163.

A protective order is only a solution to a discovery issue after information has been compelled, but it should be imposed only *after* the mandated balancing test.

Decades of authority in this area will not justify a protective order as a substitute for a First Amendment Balancing test.

Despite the existence of a protective order one court has held that membership lists are not discoverable in litigation. The court reasoned that once drawn into litigation, whether under protection order or not, members and donors would be likely to withdraw or reduce their support of an organization. ***Eilers v. Palmer*, 575 F. Supp. 1259 (Mn., 1984.)**

The Washington State ***Rhinehart*** cases stand alone among other jurisdictions, in ordering associational privacy of individuals to be invaded. In other jurisdictions, discovery is ordered in very narrow and specific situations where the groups have publicly advocated violence or other unlawful goals. ***Families Unidas*, 619 F.2d at 403.** Aquarian Foundation has never advocated violence and has sought only to practice its beliefs in peace.

Therefore, the state courts have trampled this religion's and its members' rights, by forcing it to choose between its very existence and invade its members' rights to associational privacy, or to forego litigation to stop the vicious media attacks against it.

This significant Constitutional issue deserves to be reviewed by the U.S. Supreme Court, to deny discovery of member lists, or at minimum, to require the balancing test – require the Seattle Times to justify its need for the member lists, and to demonstrate how it has attempted to obtain the discovery needed in alternative ways.

This issue has a far-reaching impact upon all religious, economic, and political groups, particularly minority groups. These groups are most critically protected by the First Amendment, and if they are not, then the First Amendment no longer affords private and free association.

2. Is it a denial of Due Process and Equal Protection when a fee statute is interpreted to award fees without requiring the party to segregate fees unrelated to the action dismissed for lack of merit? *YES.*

RCW 4.84.185 was enacted by Laws 1983, Chapter 127, Section 1. RCW 4.84.185 states in relevant part:

> ***In any civil action, the court having jurisdiction may, upon written findings of the judge that the action . . . was frivolous and advanced without reasonable cause, require***

> *that the nonprevailing party to pay the prevailing party the reasonable expenses . . . incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense . . .*

RCW 4.84.185 by its plain terms is limited to authorizing reasonable fees for the portion of any case found frivolous.

Washington State law requires that accounting for attorneys fees must be segregated where attorney fees are awarded for only some of the claims of a case. In ***Gaglidari v. Denny's Restaurants,* 117 Wash.2d 426 (1991),** the Supreme Court of Washington held that attorney fees must be segregated and limited to only the claims that were authorized by an award. Citing ***Travis v. Washington Horse Breeders,* 759 P.2d 418, 425 (Wash.1988),** a segregation of two different legal theories was ordered by the court in a cause of action where fees were awarded for just one legal theory. The court in *Travis* held that the party must **"separate the time spent on those theories essential to [one cause of action] and time spent on legal theories relating to the other causes of action."** *Id.* The Supreme Court of Washington also held in ***Nordstrom, Inc. v. Tampourlos,* 733 P.2d 208 (Wash. 1987)** that an award of attorney fees must only represent the services associated with the cause of action which granted the award. *Nordstrom* **at 212. The court stated that Nordstrom would have an unfair benefit if it was awarded fees for aspects of the suit which had nothing to do with the violation of the cause of action for which fees were awarded.**

THE TRIAL COURT FAILED TO SEGREGATE FEES, AND DEPRIVED PETITIONERS OF

PROPERTY WITHOUT DUE PROCESS AND IN VIOLATION OF EQUAL PROTECTION.

The judicial application of a statute may violate the Fourteenth Amendment Due Process and Equal Protection clauses when application of the law is arbitrary or when a protected group is arbitrarily treated differently from others.

The Due Process Clause requires that laws operate on all alike, and that individuals not be subject to the arbitrary exercise of government powers. ***Caldwell v. State of Texas*, 11 S.Ct. 224, 137 U.S. 692, 34 L.Ed. 816 (1891).** Deprivation of property by some unreasoned or unreasonable imposition of liability is a deprivation of Due Process. ***Pearson v. Northeast Airlines, Inc.*, C.A.N.Y. 1962, 309 F.2d 553, *cert. den.* 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720.**

Here, the state courts have departed from any rational reading of the state statute, and from their own prior pronouncements regarding how to read the statute. The $40,000.00 terms against Petitioners is based upon an arbitrary 50% division of fees between the issues in the case, and this arbitrary division violates the requirement by state law that actual time expended on each matter be segregated.

Equal Protection demands at minimum that a state must apply laws in a rational and nonarbitrary way, so that the application of the law rationally furthers some legitimate, articulated state purpose, and does not constitute invidious discrimination. ***Ciechon v. City of Chicago*, 686 F.2d 511 (C.A. Ill. 1982).** This clause prohibits discriminatory governmental action in administration of a law; it prohibits discriminatory enforcement of valid statutes. ***Britton***

v. Rogers, **631 F.2d 572 (C.A.Ark. 1980),** *cert. den.* **101 S.Ct. 2021, 451 U.S. 939, 68 L.Ed.2d 327.** *Shock v. Tester,* **405 F.2d 852 (C.A.Ark.,1969),** *cert. den.* **89 S.Ct. 1641, 394 U.S. 1020, 28 L.Ed.2d 45,** *reh. den.* **89 S.Ct. 2004, 395 U.S. 941, 23 L.Ed.2d 460.** Strict judicial scrutiny is required when a "suspect class" – including a religion – is treated differently than others in an enforcement action. ***Hanbron v. Epstein,*** **412 F. Supp. 256 (D.C. Md. 1976),** *aff'd* **97 S.Ct. 41, 429 U.S. 802, 50 L.Ed.2d 67.**

Here, the state court did not bother to make any findings to justify its departure from the state law that requires segregation of fees; it made an arbitrary award in violation of its own statute. It cannot pass any test, much less a test of strict scrutiny that requires a showing of a compelling state interest to justify the confiscatory fees awarded.

This court should review this issue where arbitrary action has penalized a litigant in a "suspect class" by awarding $40,000.00 in fees that are not authorized by the terms of the state statute when opposing counsel could segregate only approximately $7000.00 for the case that was found frivolous.

3. Is it a denial of Due Process and Equal Protection when the subjective criterion, "possibility of success" is used in finding a case frivolous and awarding terms? *YES.*

THE "REASONABLE POSSIBILITY OF SUCCESS" CRITERION IS UNCONSTITUTIONALLY VAGUE TO USE FOR A FINDING OF FRIVOLITY.

The holding of the appellate court below is that the concept of frivolity in Washington State is not vague and unconstitutional:

> **[T]he concept of frivolity is neither vague, nor unconstitutional. A frivolous action is one that cannot be supported by any rational argument on the law or facts. 59 Wash. App. at 340.**

However, the same opinion goes on to apply a **totally different standard in justifying the findings that Aquarian Foundation's 1986 litigation was frivolous:**

> **The case is so devoid of merit that there is no reasonable possibility of success. 59 Wash. App. at 341.**

This second concept of frivolity allows a court to judge a litigant arbitrarily and subjectively. Litigants who dare to bring novel or minoritarian views for court review will have a smaller likelihood of success than other litigants; this second standard is vague and improperly penalizes litigants like Aquarian Foundation, who hold unpopular or minoritarian views. It allows a trial court to find frivolity and impose sanctions that may create a chilling effect or an economic barrier that will bar such litigants from the courts. These same litigants need the protection of the courts in order to continue to exist in a pluralistic society.

Due process is violated when a state penalizes resort to the courts in doubtful cases. *Missouri v. Chicago*, 36 S.Ct. 715, 241 U.S. 533, 60 L.Ed. 1148

(1916). In general, citizens are protected from arbitrary state action by the Due Process Clause. ***Zannino v. Arnold,* 531 F.2d 687 (C.A.Pa. 1976).**

In this case, the standard of "possibility of success" allows the state court to make a subjective determination. It inherently allows difficult, novel, and unpopular cases to be judged more harshly because they have a lesser "possibility of success." The standard allows arbitrary action depending upon the personal opinion of the judge or the conservative or liberal climate among the judiciary. This standard, then, is vague and arbitrary, and violates due process.

Because the state of Washington has two different standards to apply in finding whether a case is frivolous, the unequal enforcement of these standards results in the violation of Equal Protection. When there is an unequal enforcement of a standard and it is arbitrarily assigned to persons in a suspect category, such as religion, then Equal Protection is violated. ***Stone v. Chelan County Sheriff's Dept.*, 756 P.2d 736, 110 Wash.2d 806 (1968).**

Here, the state has analyzed the concept of frivolity and upheld it as constitutional, when it is articulated as "a rational argument on the law or on the facts." In this same case, the state has applied a completely different standard to petitioner, a religion. This completely different standard is no better than a subjective opinion of whether there is a "possibility of success". The state has not attempted to show why it would apply one standard for frivolity to petitioners and another when it reviews its

standards to determine if they pass constitutional muster. This is an arbitrary use of a subjective standard as to petitioners, and this is a violation of petitioners' Equal Protection rights under the United States Constitution.

A leading Washington case on the issue of frivolity, ***Streater v. White*, 26 Wash. App. 430, 613 P.2d 187 (1980)**, mixes both of the above concepts in defining frivolity in Washington State. It is this infusion of a subjective standard in the concept of frivolity that should be reviewed by This Court. Until it is reviewed, the state court is free to apply the subjective standard to litigants in an arbitrary manner, instead of consistently applying the objective, proper criteria of whether or not the case can be supported in fact or law.

CONCLUSION

THEREFORE, THE COURT IS URGED TO ACCEPT REVIEW OF THE SIGNIFICANT CONSTITUTIONAL ISSUES HEREIN.

DATED THIS 29th DAY OF SEPTEMBER, 1994.

LAW OFFICES OF JEAN SCHIEDLER-BROWN & ASSOCIATES, P.S.
JEAN SCHIEDLER-BROWN
WSBA No. 7753

APPENDICES

A. OPINION SOUGHT TO BE REVIEWED AND SUBSEQUENT ORDERS.....App. 1

1. *OPINION OF THE STATE OF WASHINGTON COURT OF APPEALS, DIVISION 1, Rhinehart v. the Seattle Times,* 59 Wash. App. 332, 798 P.2d 1155 (1990).....App. 1

2. Order affirming decision after remand, May 3, 1993..... App. 15

3. Order denying Appellants' Motion for Reconsideration, December 6, 1993..... App. 17

4. Order denying Petition for Review to Washington State Supreme Court, July 6, 1994.....App. 19

B. CONSTITUTIONAL AND STATUTORY PROVISIONS CITED.....App. 21

1. *U.S. CONSTITUTION, AMENDMENT I* App. 21

2. *U.S. CONSTITUTION, AMENDMENT XIV, SECTION 1*..... App. 22

3. *RCW 4.84.185*..... App. 23

59 Wash.App. 332

Keith Milton RHINEHART, a single person; The Aquarian Foundation, a Washington not-for-profit corporation, Appellants,

v.

The SEATTLE TIMES, a Delaware corporation, d/b/a The Seattle Times; Erik Lacitis and Jane Doe Lacitis, Respondents.

The AQUARIAN FOUNDATION, a not-for-profit corporation; Reverend Keith Milton Rhinehart, a single person; Linda Dunn, a married person, Appellants,

v.

The SEATTLE TIMES, INC., a Delaware corporation; Ross Anderson, Jane Doe Anderson, and his marital community, Respondents.

Nos. 22258-9-I, 22401-8-I.

Court of Appeals of Washington,
Division 1.

Aug. 13, 1990.

Reconsideration Denied Sept. 24, 1990.

Spiritual organization and its leader appealed from an order of the Superior Court, King County, which dismissed their actions against newspaper and its reporters for alleged defamation. The Court of Appeals, Grosse, Acting C.J., held that: (1) dismissal of libel action for willful failure by plaintiffs to comply with discovery orders requiring production of membership lists, donation records, and videotape of a certain performance, was not error where plaintiffs did not show some probability

that the requested disclosure would infringe upon organization's constitutional rights, especially in light of protective orders indicating that the documents could only be used for purposes of the litigation; (2) concept of "frivolity," for purposes of awarding attorney fees for bringing frivolous action, is not unconstitutionally vague; and (3) trial court did not abuse its discretion in awarding fees under statute governing frivolous actions or rule governing verification of pleadings where most of issues in defamation case had been raised and rejected in at least two prior cases and where case was so devoid of merit that there was no reasonable possibility of success.

Order in accordance with opinion.

Jean Schiedler-Brown, Seattle, for appellant, Keith Milton Rhinehart.

Bruce Johnson and Howard Stambor, Seattle, for respondent, Seattle Times.

GROSSE, Acting Chief Judge.

Appellants Keith Milton Rhinehart and The Aquarian Foundation appeal the trial court's order dismissing their actions against The Seattle Times, Inc., and its reporters Erik Lacitis (Rhinehart II – filed in 1982) and Ross Anderson (Rhinehart III – filed in 1986) for alleged defamation and the damages resulting therefrom. Rhinehart III was dismissed on summary judgment. Rhinehart II was dismissed for failure to obey the court's discovery order under CR 37.

Rhinehart is the leader of a Seattle-based spiritualist organization, The Aquarian Foundation. Rhinehart and The Aquarian Foundation (collectively referred to herein

as Rhinehart) have filed several complaints against the Times.

This consolidated appeal involves two of the cases which were consolidated in the trial court. "Rhinehart II" was a 1982 libel lawsuit based on articles written by Seattle Times reporter Erik Lacitis. "Rhinehart III" was a 1986 libel lawsuit based on articles written by Seattle Times reporter Ross Anderson. These suits were the second and third in a series of cases filed by Rhinehart against the Times. Rhinehart also filed actions against the Seattle based television station KIRO, Inc., and its owner. The previous cases and these new ones are basically a reargument of the same issues of defamation, discovery, and dismissal for failure to comply with discovery orders. Issues similar to those brought by this appeal are the subject of a recent Supreme Court opinion, *Snedigar v. Hoddersen*, 114 Wash.2d 153, 786 P.2d 781 (1990). Also at issue is the proper determination of attorney's fees.

In May of 1988, this court affirmed the dismissal of Rhinehart's first complaint (Rhinehart I) because of repeated refusals to comply with the trial court's discovery orders. *Rhinehart v. Seattle Times Co.*, 51 Wash.App. 561, 573-78, 754 P.2d 1243, *review denied*, 111 Wash.2d 1025 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989). That decision also held that the appeal was frivolous and in bad faith. After these lawsuits were filed, the Times sought discovery from Rhinehart. Again, Rhinehart resisted discovery and objected. A protective order was entered to protect Rhinehart's privacy interest and those of his church and membership,

yet he still failed to produce the requested documentation. The trial court heard many motions about the various requests for production of documents. Eventually the Times moved for summary judgment in both of these cases. These motions were heard and Rhinehart III was dismissed on summary judgment, dismissing the suit with prejudice and awarding the Times its fees and costs. The trial court initially reserved its decision in Rhinehart II. On May 11, 1988 the court entered an order awarding expenses and attorney's fees in Rhinehart III. In its findings the court held that the lawsuit was frivolous and advanced without reasonable cause, and further found that the suit was brought to harass and needlessly increase the cost of the litigation to the Times and other defendants. The court ordered Rhinehart to pay $40,000 in attorney's fees and $1,981.21 in costs based on the affidavit of counsel for the Times.[1] On May 13, 1988 the trial court dismissed Rhinehart II and awarded defendants attorney's fees incurred because of Rhinehart's refusal to obey its discovery order.

Rhinehart has not challenged any of the findings of fact or conclusions of law in this case. This is best shown by reference to counsel's argument at page 71 of the appellants' brief. In discussing *Streater v. White*, 26 Wash.App. 430, 613 P.2d 187 (1980), counsel argues that the challenges were to the findings of fact and not to the legal principles, whereas in this case, appellants are directly challenging the legal principles. Findings of fact to which no error is assigned are accepted as verities on

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[1] The court reduced the requested amount of the fees from $66,699.02 to $40,000.

appeal. *Kelly v. Powell*, 55 Wash.App. 143, 146, 776 P.2d 996 (1989) (reconsideration granted 11-30-89); *see also State v. Harris*, 106 Wash.2d 784, 790, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). In addition, throughout the appellants' brief contentions are made without citation to authority. A contention not supported by authority or argument need not be considered on appeal. RAP 10.3(a)(5); *McKee v. American Home Prods. Corp.*, 113 Wash.2d 701, 705, 782 P.2d 1045 (1989); *Bremerton v. Shreeve*, 55 Wash.App. 334, 338, 777 P.2d 568 (1989). Appellate courts will only review a claimed error if it is included in an assignment of error, or clearly disclosed in the associated issue included in the brief. It must also be supported by argument and citation to legal authority. *BC Tire Corp. v. GTE Directories Corp.*, 46 Wash.App. 351, 355, 730 P.2d 726 (1986), *review denied*, 108 Wash.2d 1013 (1987); RAP 10.3(a)(5); RAP 10.3(g).

Although Rhinehart has failed to set out proper assignments of error, the manner in which the claimed errors are set forth and described in the brief is adequate to understand what has been asserted as error. The Times had no difficulty in responding directly to the issues raised and the failure tc properly assign error was not prejudicial to appellate review.[2]

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[2] Counsel for Rhinehart should note that rules on appeal are to be followed and that the Court of Appeals is not required to decide an appeal on its merits where the rules have not been followed.

I.

Rhinehart first alleges the trial court erred in dismissing the complaint. Subsumed under this issue are most of the issues already determined by other courts in the prior Rhinehart cases. Specifically, Rhinehart reargues that the court erred in ordering Rhinehart to produce the membership lists, donation records, and the videotape of the performance at the Washington State Penitentiary in Walla Walla. Additionally, Rhinehart alleges that the court erred in dismissing the complaint for failure to comply with discovery orders.

Rhinehart contends that requiring the production of the material violates its First Amendment rights of freedom of association and free exercise of religion. This argument was previously rejected in *Rhinehart v. Seattle Times Co.*, 98 Wash.2d 226, 257, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); *Rhinehart v. Seattle Times Co.*, 51 Wash.App. at 569-72, 754 P.2d 1243; and *Rhinehart v. KIRO, Inc.*, 44 Wash.App. 707, 708, 723 P.2d 22 (1986), *review denied*, 108 Wash.2d 1008 (1987).

Rhinehart contends the trial court failed to balance the Foundation's rights against the Times' interest in defending the action. However, a protective order was entered indicating the documents could only be used for purposes of this litigation. Similar orders have been held adequate to protect the Foundation against discovery abuse. *See Rhinehart v. Seattle Times Co.*, 98 Wash.2d at 257, 654 P.2d 673; 51 Wash.App. at 571, 754 P.2d 1243; *Rhinehart v. KIRO, Inc.*, 44 Wash.App. at 709, 723 P.2d 22. There is no basis to distinguish this case from the prior cases on this issue.

Recently, in *Snedigar v. Hoddersen,* 114 Wash.2d 153, 786 P.2d 781 (1990), the Supreme Court adopted an analysis to be used in determining whether First Amendment privileges preclude or limit discovery. First, the party asserting the privilege must make an initial showing that disclosure would, with some probability, harm its First Amendment rights. If this preliminary showing of privilege is made, the burden shifts to the party seeking discovery to establish the relevance and materiality of the information sought and to show that reasonable efforts to obtain this information by other means have been unsuccessful. If the burden is met the trial court then balances the parties' competing claims of privilege and need. At the Court of Appeals level in *Snedigar v. Hoddersen,* 53 Wash.App. 476, 768 P.2d 1 (1989), *aff'd in part, rev'd in part,* 114 Wash.2d 153, 786 P.2d 781 (1990), the court held that the party resisting discovery did not meet the burden of establishing the information sought was constitutionally privileged. The court, therefore, declined to reach the relevancy issue. The Supreme Court in its opinion indicated the Freedom Socialist Party had made the threshold showing of associational privilege and that it was necessary for the trial court to evaluate the relevancy of the disclosure and therefore balance the parties' competing interests.

Although both *Snedigar* opinions were filed after the trial court decision in these cases, the trial court essentially followed the same approach as that set out in the Supreme Court's decision in *Snedigar.* Indeed, under *Snedigar,* the second and third steps of relevancy evaluation and balancing would not be reached here because the findings and conclusions of the prior cases have already

determined that Rhinehart has not shown some probability that the requested disclosure would impinge on the Foundation's constitutional rights, especially in light of the protective orders.[3]

II.

Rhinehart further contends that the trial court erred in dismissing the action for failure to comply with the discovery order because the noncompliance was not willful and the Times was not prejudiced.

The trial court has broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order and its decision will not be overturned absent a manifest abuse of discretion. *Rhinehart v. KIRO, Inc.*, 44 Wash.App. at 710, 723 P.2d 22; *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 548 P.2d 558 (1976); *see also Anderson v. Mohundro*, 24 Wash.App. 569, 604 P.2d 181 (1979) (upholding dismissal of plaintiff's action because of willful and deliberate noncompliance with the trial court's discovery order). In the prior Rhinehart cases this court upheld dismissal of the complaints where the plaintiffs supplied vague or incomplete responses or failed to respond to interrogatories and requests for production following issuance of orders compelling discovery, subject to protective orders such as here. Here again, the record supports the conclusion that

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[3] In addition, Rhinehart contends that the decisions in these prior cases are ill-reasoned and in conflict with the law of other jurisdictions and should now be reversed. At this juncture, a reversal could only come from the Supreme Court. *See State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984).

Rhinehart's violation of the discovery rules was willful and deliberate, *i.e.*, was done without reasonable excuse. *Rhinehart v. Seattle Times Co.*, 51 Wash. App. at 577, 754 P.2d 1243. The Times was prejudiced in its ability to prepare its defense and no less drastic action would have sufficed. *Rhinehart v. Seattle Times Co.*, 51 Wash.App. at 577, 754 P.2d 1243; *Rhinehart v. KIRO, Inc.*, 44 Wash.App. at 711, 723 P.2d 22. The trial court did not abuse its discretion in dismissing Rhinehart's complaint.

III.

Next, Rhinehart contends the trial court erred in awarding attorney's fees and costs and, further, even if fees and costs are allowable, a sufficient determination of a reasonable amount was not made by the trial court. Although not specifically set out in a challenge to the finding of fact, Rhinehart argues with the trial court's determination that his claims in Rhinehart III were frivolous in violation of RCW 4.84.185. Part of this attack deals with a challenge that the concept of "frivolity" is unconstitutional.

The decision to make an award of attorney's fees under RCW 4.84.185 is left to the discretion of the trial court and will not be disturbed in the absence of a clear showing of abuse. *Clarke v. Equinox Holdings, Ltd.*, 56 Wash.App. 125, 131-33, 783 P.2d 82, *review denied*, 113 Wash.2d 1001, 777 P.2d 1050 (1989); *see also Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wash.2d 614, 625, 724 P.2d 356 (1986). A trial court cannot be said to abuse its discretion in awarding attorney's fees under RCW 4.84.185 if the facts alleged do not state a cause of action

that can be supported by any rational argument on the law or facts. *Camer v. Seattle Sch. Dist. 1*, 52 Wash.App. 531, 539, 762 P.2d 356 (1988), *review denied*, 112 Wash.2d 1006, *cert. denied*, ___ U.S. ___, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989).

This state has developed a clear standard for determining whether an appeal is frivolous and brought for the purpose of delay. *Millers Casualty Ins. Co. v. Briggs*, 100 Wash.2d 9, 15, 665 P.2d 887 (1983); *Streater v. White*, 26 Wash.App. 430, 434, 613 P.2d 187 (1980). *See also Bill of Rights Legal Found. v. Evergreen State College*, 44 Wash.App. 690, 696-97, 723 P.2d 483 (1986). Unlike Rhinehart's argument to the contrary, the "concept of frivolity" is neither vague, nor unconstitutional. A frivolous action is one that cannot be supported by any rational argument on the law or facts. *Camer*, 52 Wash.App. at 539, 762 P.2d 356, *Bill of Rights Legal Found.*, 44 Wash.App. at 696-97, 723 P.2d 483. This standard requires the trial court to exercise its judgment in determining whether an action can be supported by any rational argument. It is not vague. *See State v. Worrell*, 111 Wash.2d 537, 544, 761 P.2d 56 (1988) (criminal statute is not unconstitutionally vague where statutory language lends itself to common sense interpretation and the phrase has been interpreted in case law providing additional guidance to its meaning). The burden of proving a statute unconstitutional is on the party challenging the statute. The burden on the challenging party is that the statute must be proven to be unconstitutional beyond a reasonable doubt. *State v. Brayman*, 110 Wash.2d 183, 193, 751 P.2d 294 (1988). Rhinehart has not met this test.

Rhinehart also challenges the determination by the trial court that there was a violation of CR 11. The determination of whether a violation of CR 11 has occurred is within the sound discretion of the trial court. *Doe v. Spokane & Inland Empire Blood Bank,* 55 Wash.App. 106, 110, 780 P.2d 853 (1989). If the court determines that a violation has occurred, the rule makes the imposition of sanctions mandatory. *Miller v. Badgley,* 51 Wash.App. 285, 301, 753 P.2d 530, *review denied,* 111 Wash.2d 1007 (1988). The trial court retains broad discretion regarding the nature and scope of sanctions which could range from a reprimand to the full award of attorney's fees and other appropriate penalties. *Badgley,* 51 Wash.App. at 303, 753 P.2d 530.

A plaintiff's complaint may subject the party to CR 11 sanctions if three conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct reasonable inquiry into the factual or legal basis of the action. CR 11. The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Badgley,* at 299-300, 753 P.2d 530.

Most of the issues in this case have been raised and rejected in at least two prior cases. The remaining issues are not debatable. The case is so devoid of merit that there was no reasonable possibility of success. The trial court did not abuse its discretion in awarding fees under either RCW 4.84.185 or CR 11.

Next, we must determine whether the trial court abused its discretion by failing to create a sufficient record as to the amount of attorney's fees to permit a

proper review or, in the alternative, whether the record, if any before this court, shows the reasoning by which the trial court set the fees at the amount in the findings and conclusions. The issue has merit. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 596, 675 P.2d 192 (1983); *Progressive Animal Welfare Soc'y v. University of Wash.*, 54 Wash.App. 180, 186-87, 773 P.2d 114 (1989), *aff'd*, 114 Wash.2d 677, 790 P.2d 604 (1990). Unfortunately, the verbatim report of proceedings, if any, as to determination of fees, and why the trial judge set them or reduced them from the requested amount of $66,699 to $40,000, is not before the court. While the determination of the fees at trial is best left up to the trial court, that court must make a sufficient record to enable the appellate court to conduct a proper review. Because there is no record of the hearing before us in this case, we cannot undertake a proper review and must remand to the trial court.

The Times seeks the imposition of sanctions on appeal in the form of attorney's fees and costs pursuant to RAP 18.9(a). RAP 18.9(a) authorizes this court to impose sanctions against a party who brings an appeal that is frivolous and brought for the purpose of delay. *Millers Casualty Ins. Co. v. Briggs*, 100 Wash.2d at 15, 665 P.2d 887; *Streater v. White*, 26 Wash.App. at 434, 612 P.2d 187. Sanctions may include, as compensatory damages, an award of attorney's fees to the opposing party. *See* Comment, RAP 18.9; *Bill of Rights Legal Found. v. Evergreen State College*, 44 Wash.App. at 690, 723 P.2d 483. In addition, if an appeal is found to be frivolous, this court can award CR 11 sanctions pursuant to RAP 18.7 against the party or his counsel filing the frivolous and

non-meritorious action. *See Layne v. Hyde*, 54 Wash.App. 125, 136, 773 P.2d 83, *review denied*, 113 Wash.2d 1016 (1989).

While the issues in this case have been raised again and again and rejected each time, there is one issue that has merit and that is how the trial court determined the reasonableness of the attorney's fees, an issue which we cannot determine on the record before us. Therefore, not all of the appeal can be said to be frivolous and request for fees on appeal will be denied.

The decision of the trial court is affirmed except as to the issue of the amount of attorney's fees. However, because the issue of attorney's fees has already been the subject of one hearing in the trial court and is a subject of this appeal, and because the history of this matter and related cases is such that further appeals appear certain, we find that the appropriate remedy is for this court to retain jurisdiction to refer this case to the trial court either for entry of additional findings on the determination of the issue of attorney's fees in accordance with *Bowers*, or in the alternative to have the record supplemented by filing the verbatim report of proceedings on the determination of the attorney's fees.

Therefore, it is hereby ordered that this matter is referred to the trial judge who entered the orders that are the subject of this appeal for entry of additional findings of fact on the issue of the proper amount of attorney's fees to be awarded to respondents for their defense of these matters through trial or, in the alternative, in its discretion, if the trial court finds that a verbatim report of the hearing on the issue of attorney's fees exists, and that

it is sufficient for this court to determine whether the award was properly considered by the trial court, then the trial court may order the supplementation of the record in this court. If the trial court decides to make additional findings, these findings shall be made from the record as presently constituted, unless the trial judge determines that additional evidence is necessary in order to comply with the principles set forth in this opinion. Any hearing hereon, the entry of the findings, or the supplementation of the record, shall be accomplished within 30 days of the filing of this opinion and order. After entry, the parties shall cause the verbatim report, the findings, and any objections thereto, to be immediately transmitted to this court for such further action as shall prove necessary.

BAKER and PEKELIS, JJ., concur.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

/s/ Walter E. Webster, Jr.
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Appellants,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS,

Respondents.

NO. 22258-9-I
consolidated with:
No. 22401-8-I

DIVISION ONE

THE AQUARIAN FOUNDATION, a not-for-profit corporation; REVEREND KEITH MILTON RHINEHART, a single person; LINDA DUNN, a married person,

Appellants,

v.

THE SEATTLE TIMES, INC., a Delaware corporation; ROSS ANDERSON, JANE DOE ANDERSON, and his marital community,

Respondents.

(Filed
May 3, 1993)

GROSSE, J. – This case comes before this court after referral to the trial court for entry of findings of fact and conclusions of law to support the trial court's award of attorney fees to respondents. We have reviewed those findings and conclusions and affirm the award of attorney fees.[1]

The trial court correctly based its decision as to the amount of fees to award on application of the factors set forth in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596, 675 P.2d 193 (1983), to the particular facts and circumstances of this case.

The decision of the trial court is affirmed.

/s/ Grosse, J.

WE CONCUR:

/s/ Baker, J.

Pekelis, A.C.J.

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[1] Final action by this court was delayed due to the inadvertent transmittal of this case to the Supreme Court prior to final action here.

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTHON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Appellants,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS,

Respondents.

NO. 22258-9-I
consolidated with
No. 22401-8-I

DIVISION ONE

ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

THE AQUARIAN FOUNDATION, a not-for-profit corporation; REVEREND KEITH MILTON RHINEHART, a single person; LINDA DUNN, a married person,

Appellants,

v.

THE SEATTLE TIMES, INC., a Delaware corporation; ROSS ANDERSON, JANE DOE ANDERSON, and his marital community,

Respondents.

(Filed
Dec. 6, 1993)

The appellants, Keith Milton Rhinehart, The Aquarian Foundation, and Linda Dunn, having filed a motion for reconsideration herein, and the Court having determined that it should be denied, now, therefore, it is hereby ORDERED that appellants' motion for reconsideration be, and the same hereby is denied.

DATED this 6th day of December, 1993.

FOR THE PANEL:

/s/ Grosse, J.
Presiding Judge

THE SUPREME COURT OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation,

Petitioners,

v.

THE SEATTLE TIMES, a Delaware corporation, d/b/a THE SEATTLE TIMES; ERIK LACITIS and JANE DOE LACITIS,

Respondents.

THE AQUARIAN FOUNDATION, a not-for-profit corporation; REVEREND KEITH MILTON RHINEHART, a single person; LINDA DUNN, a married person,

Petitioners,

v.

THE SEATTLE TIMES, INC., a Delaware corporation; ROSS ANDERSON, JANE DOE ANDERSON, and his marital community,

Respondents.

NO. 61231-5

ORDER

C/A NO. 22258-9-I (22401-8-I consol. w/22258-9-I)

(Filed July 6, 1994)

This matter came before Department II of the Court on its July 6, 1994, Motion Calendar on Petition for Review. Department II having considered the Petition and the files herein, and the five members of the Department having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of July, 1994.

/s/ James A. Andersen
CHIEF JUSTICE

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES: DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RCW 4.84.185

4.84.185 Prevailing party to receive expenses for opposing frivolous action or defense. In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after an order of dismissal, order on summary judgment, or final judgment after the trial or other final order terminating the action as to the prevailing party. In no event may such motion be filed more than thirty days after entry of the order. The judge shall consider the action, counterclaim, cross-claim, third party claim, or defense as a whole.

The provisions of this section apply unless otherwise specifically provided by statute. [1987 c 212 § 201; 1983 c 127 § 1.]